IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.51/2003

1. Shri Custodio Mascarenhas,
married, retired,
House No.249, Cardozwaddo,
Taleigao, Ilhas, Goa.

2. Smt. Catarina Mascarenhas,
wife of Custodio Mascarenhas,
House No.249, Cardozwaddo,
Taleigao, Ilhas, Goa. ..... Appellants.

Vs.

1. Mrs. Marquinha Fernandes,
wife of Anthony Fernandes,
residing at Bombay.

2. Mrs. Maria Ubaldina Fernandes,
widow of Esteves Fernandes,
Taleigao, Ilhas, Goa.

3. Mrs. Maria Pereira,
widow of Paul Pereira,
Deolai-Dist, Nasik. ..... Respondents.

Mr. Joseph Vaz, Advocate for the appellants.

CORAM : F.I. REBELLO, J.

DATE : AUGUST 8, 2003.

ORAL ORDER :

The respondents had filed a suit against the appellants herein on the ground that Domingos Maria Gonsalves, their predecessor had been declared as mundkar of the house and in fact was so declared vide order dated 30.9.1982. It was their contention that the appellants herein had been allowed to reside in the suit premises by the aforesaid persons, but the

respondents, thereafter, called on the appellants herein to vacate the suit house. Inspite of repeated demands as the appellants refused to vacate, the suit was filed. The contention of the appellants herein was that they were mundkars of the suit house. No issue was framed in respect of the mundkarship, nor did the appellants ventilate any grievance of non-framing of the issue. The suit came to be decreed on the ground that the respondents had established that it was the mundkarial house of late Domingos Maria Gonsalves and they were his legal representatives. Being aggrieved, an appeal was preferred. One of the points for determination as framed by the first Appellate Court was whether the respondents have proved that the appellants are trespassers and the trial Court was justified in ordering eviction of the appellants. The issue of mundkarship was raised before the first appellate Court on the ground that the trial Court had failed to frame the issue of mundkarship and refer the same to the Mamlatdar. The appellate Court upheld the said finding of non-framing of issue. The plea taken by the appellants herein was that the defendants reside as mundkars in the suit house and the plea was ambiguous, as it was not clear against whom the present appellants were claiming to the mundkars. The appellate Court also noted that Domingos Maria

Gonsalves was already registered as mundkar. The findings of the trial Court were upheld and the appeal was consequently dismissed. Against that, the present second appeal.

2. On behalf of the appellants, learned Counsel contended firstly that both the Courts below erred in law in not framing the issue of mundkarship considering the material on record. From the evidence on record, it is clear that Domingos Maria Gonsalves had been registered as a mundkar. The appellants herein had also applied for registration of mundkarship being case No.MND/Reg/ KM-I/5/90 which was rejected as Domingos Maria Gonsalves was occupying the house as mundkar. The appellants also did not ventilate their grievance against non-framing of issue at the relevant time and allowed the suit to proceed. The reasons given by the first appellate Court for non-framing of issue, to my mind are correct. Merely because there is a pleading, would not result in the Court framing an issue unless material particulars are set out based on which the issue ought to have been framed. In the light of that the contention as raised has to be rejected.

3. It is next contended that the inquiry of

mesne profits ought not to have been allowed as the appellants had established that they were in the premises in the year 1970, wherein the case of the respondents was that they were inducted in the year 1979. The date of possession would be immaterial. What is material is the nature of possession. In the instant case, the plaintiffs have come to the Court with a plea that the respondents were inducted by late Domingos Maria Gonsalves as licensee. That licence was terminated. Once the licence is terminated and the Courts below have found in favour of the respondents, the respondents would be entitled to claim mesne profits. The Second Appeal has no merit. In the light of that the second appeal is rejected.

F.I. REBELLO, J.

ssm.